Supreme Court, U.S.
FILED
FEB 10 1998
OFFICE OF THE CLERK

No. 97-1214

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MARGARET CHRISTIAN,

Petitioner,

v.

ST. ANTHONY'S MEDICAL CENTER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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17 pp

LIST OF PARTIES

The proper name of respondent, as contained in the opinion issued by the United States Court of Appeals for the Seventh Circuit on July 1, 1997, is St. Anthony Medical Center, Inc. The parent corporation of respondent is Franciscan Sisters of Chicago, an Illinois corporation.

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Respondent, St. Anthony Medical Center, Inc. (SAMC), respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Seventh Circuit decided on July 1, 1997, which the appellate court declined to rehear on July 30, 1997.

REASONS THE PETITION SHOULD BE DENIED

The United States Court of Appeals for the Seventh Circuit correctly held that petitioner does not fit within the purview of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq*. The appellate court properly recognized that while petitioner has the hemic condition hypercholesterolemia, meaning that she has an excessive amount of cholesterol in her blood, she is not disabled as contemplated by the Americans with Disabilities Act.

The Court of Appeals for the Seventh Circuit rejected petitioner's petition for rehearing and suggestion of rehearing en banc. This Court should deny petitioner's petition for a writ of certiorari for the following reasons:

1. Petitioner argues that this Court should review the opinion of the Court of Appeals for the Seventh Circuit because it clarifies that if a person has a medical condition that is not itself disabling, but nevertheless requires, in the prudent judgment of the medical profession, treatment that is disabling, such a person would fit within the class of persons protected by the Americans with Disabilities Act. This comment by the appellate court, as discussed below, presents no basis for this Court to grant the petition for a writ of certiorari.

First, as the Court of Appeals for the Seventh Circuit explained, the likely reason that no other Seventh Circuit case speaks directly to this question is because the answer is obvious. Certainly a person who experiences a substantial impairment of a major life activity because of the effect of required medical care is a disabled person as defined in the Americans with Disabilities Act. As pointed out by the appellate court in the present case, the Eleventh Circuit Court of Appeals, in *Gordon v. E.L. Hamm & Associates*, 100 F.3d 907 (7th Cir. 1996), simply assumed that chemotherapy treatment for cancer that was not itself disabling could bring the individual within the Americans with Disabilities Act. This is common sense. This Court need not grant a petition for a writ of certiorari to announce the obvious.

Second, such an announcement by this Court would have no bearing on petitioner's case. In this regard, misstatements in petitioner's petition must be corrected. Petitioner claims that before she was discharged for falsifying her time card, "the need for plasmapheresis became apparent and was recommended by Christian's specialist." Pet. 4. This is untrue. The facts before the district court at the time summary judgment was entered for SAMC, and before the appellate court when summary judgment was affirmed, were that petitioner was to try a regimen of diet, exercise and medication, and if that failed, then she might possibly become a candidate for cycles of LDL-pheresis. The facts further revealed that the efficacy of such medical management remains unknown, since petitioner has not returned for any treatment since March 13, 1993.

Since petitioner presented no proof at the time summary judgment was entered for SAMC that the allegedly necessary treatment was required, there is no basis for this Court to grant her petition for a writ of certiorari. Petitioner cannot benefit from any statement by this Court regarding the legal effect of required medical care on potential Americans with Disabilities Act plaintiffs. The ruling would be inapplicable to her case.

2. Petitioner also argues that the Court of Appeals for the Seventh Circuit inconsistently decides employment discrimination cases. Petitioner claims that the summary judgment standard is applied with "added rigor" in all employment discrimination cases except Americans with Disabilities Act cases, which petitioner finds unfair. Petitioner's argument is the product of incomplete legal research. The appellate court does not employ two standards of review. Her argument is incorrect.

Further, petitioner addresses the "added rigor" standard in the context of determining the credibility and intent of the parties to her discharge for falsifying her time card. This argument has no application to the present case. The district and appellate courts below determined that, despite her blood condition, petitioner is not a person with a disability under the Americans with Disabilities Act. This was the threshold issue raised by SAMC's motion for summary judgment, and involved a study of the objective medical facts, not the credibility or motives of the parties.

3. Petitioner finally argues that the Court of Appeals for the Seventh Circuit misapplied Federal Rule of Civil Procedure 56(c), allegedly by "rejecting the clear adequacy of Petitioner Margaret Christian's summary judgment

evidence." Pet. 13. Petitioner's argument amounts to a request for this Court to re-weigh the evidence. That petitioner now questions the appellate court's factual findings or claims that the court of appeals misapplied Rule 56(c) of the Federal Rules of Civil Procedure presents no basis for review by this Court. Sup. Ct. R. 10(c).

Petitioner's final argument also should fail because, as explained above, it rests upon her misrepresentations of what is in the record below, rather than the actual evidence before the district court at the time of its entry of summary judgment for SAMC, and before the appellate court at the time of its proper decision to affirm summary judgment in behalf of SAMC. Again, the issue decided by summary judgment was whether petitioner had adequate proof that she was either disabled or perceived as such by SAMC. Both the district court and the court of appeals properly ruled that petitioner lacked the necessary proof, and correctly granted and affirmed summary judgment for SAMC, respectively.

ARGUMENT

I.

THE COMMENT BY THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT, THAT A PERSON WHO IS NOT OTHERWISE DISABLED CAN BECOME DISABLED BY REQUIRED MEDICAL TREATMENT, IS NOT CONTROVERSIAL AND IS INAPPOSITE TO PETITIONER'S CASE BECAUSE THERE IS NO PROOF THAT THE SUBJECT MEDICAL TREATMENT WAS REQUIRED.

Petitioner's argument that this Court should grant her petition for a writ of certiorari because the Court of Appeals for the Seventh Circuit commented that a person who is not otherwise disabled may become disabled through required medical care is specious. The court of appeals recognized that the likely reason such a comment had not previously been made is because that fact is obvious. In its opinion, the appellate court cited a decision from the Court of Appeals for the Eleventh Circuit, in which that court simply assumed that chemotherapy for a cancer patient who was not disabled could render the individual disabled. *Gordon v. E.L. Hamm & Associates, Inc.*, 100 F.3d 907 (11th Cir. 1996). There is nothing controversial or noteworthy about the appellate opinion in the present case that would warrant this Court's review. There is no need for this Court to restate the obvious.

Petitioner, however, attempts to parlay the appellate court's innocuous clarification into a basis for her petition for a writ of certiorari to be granted. Petitioner's argument must fail because it rests upon a misrepresentation of the actual facts. In particular, petitioner claims that she surmises that she was discharged "because of

her need for pheresis treatments." Pet. 8. At the time summary judgment for SAMC was granted and affirmed, there was no proof in the record that she needed pheresis.

Instead, the record contains a letter from petitioner's own doctor, authored September 16, 1996, forty-two months after petitioner was discharged by SAMC for falsifying her time card and leaving work before her shift was complete. In his letter, the physician explained that, in accordance with his April 16, 1992 recommendation, petitioner was to try a "drug regimen . . . along with a dietary and exercise program." R. 29. Petitioner's physician further noted that only if such efforts failed would petitioner possibly become a candidate for cycles of LDL-pheresis. *Id.* Finally, the doctor revealed that whether pheresis might eventually become necessary remains unknown, because petitioner had not sought any treatment since March 13, 1993. *Id.*

Thus, while petitioner alludes to "her specialist's recommendation that [she] commence plasmapheresis treatments to ameliorate her hypercholesterolemia" (Pet. 14), the actual evidence in the record demonstrates petitioner's claim to be untrue. Rather, the medical facts show that at the time of petitioner's employment at SAMC she was a person with nearly 20/20 vision with glasses, with an above-average level of cardiac fitness, and with no outward symptoms of her high cholesterol level. R. 20, 22, 29, 85. In fact, petitioner was so able-bodied during her employment that she claimed to be doing the work of "two men" around the time of her discharge. R. 29.

This distinction was not lost on the appellate court, which commented:

> Coming back to this case, we point out that it is extremely unlikely, to say the least, that pheresis *was* the indicated treatment for the plaintiff's condition. . . . In fact, she has never undergone the treatment, and her treating physician has prescribed drugs and exercise for her, not pheresis. It is an example of our earlier point about the difference between optional and required treatments.

Pet. App. 4 (emphasis in original). The court of appeals understood that the outcome of petitioner's case was not altered by its comment that required medical care may bring some individuals within the Americans with Disabilities Act. Petitioner's inability to perceive the distinction does not render the appellate court's reasoning incorrect. Petitioner's refusal to recognize the appellate court's dictum does not afford a basis for the petition for a writ of certiorari to be granted.

II.

THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT DOES NOT DISTINGUISH BETWEEN AMERICANS WITH DISABILITIES ACT CASES AND OTHER EMPLOYMENT DISCRIMINATION CASES WHEN APPLYING THE SUMMARY JUDGMENT STANDARD WITH "ADDED RIGOR."

Petitioner's argument that the Court of Appeals for the Seventh Circuit utilizes a double standard when reviewing summary judgments entered in employment discrimination cases, applying a heightened standard in all such cases except Americans with Disabilities Act cases, is the product of incomplete legal research. The argument is incorrect.

Petitioner relies on *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035 (7th Cir. 1993), an Age Discrimination in Employment Act case, 29 U.S.C. § 621 *et seq.*, in which the Court of Appeals for the Seventh Circuit expressed that it applies the summary judgment standard with "added rigor" in employment discrimination cases. Petitioner also relies on *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560 (7th Cir. 1996), an Americans with Disabilities Act case, in which the court of appeals discussed the summary judgment standard of review without mentioning the "added rigor" phrase. Petitioner concludes that the Court of Appeals for the Seventh Circuit "does not afford the ADA petitioner the security that the court will apply the summary judgment standard with 'added rigor' in an ADA case." Pet. 11. This is not so.

Initially, *Sarsha* does not state that Americans with Disabilities Act cases are precluded from the scope of employment discrimination cases to which the rigorous standard of review will be applied. The Court of Appeals for the Seventh Circuit has never made such a statement. This is merely petitioner's conclusion.

Moreover, that petitioner was able to find a Seventh Circuit opinion involving the Americans with Disabilities Act which did not utilize the "added rigor" language likewise proves nothing. Not every case contains an identical recitation of the applicable legal standard. There are often variations in the manner in which a court describes the standard of review. The appellate court in *Bombard* never stated that the "added rigor" standard would not be utilized because the case involved the Americans with Disabilities Act. This again is merely petitioner's conclusion.

SAMC respectfully directs this Court's attention to *Schmidt v. Methodist Hospital of Indiana, Inc.*, 89 F.3d 342 (7th Cir. 1996). In *Schmidt*, an Americans with Disabilities Act case, the appellate court reviewed and affirmed summary judgment in favor of the employer. 89 F.3d at 345. In discussing the standard of review, the court of appeals, this time in the context of the Americans with Disabilities Act, commented, "We apply this standard with added rigor in employment discrimination cases, where intent and credibility are crucial issues." *Id.* at 344.

Applying petitioner's logic, one could argue that *Schmidt* excludes age discrimination cases from its announced standard of review. Petitioner's logic would be buttressed by *Fuka v. Thomson Consumer Electronics*, 82 F.3d 1397 (7th Cir. 1996), an Age Discrimination in Employment Act case in the Seventh Circuit which does not contain the "added rigor" language. Of course, this does not mean that the Seventh Circuit will not apply a rigorous standard in age discrimination cases.

In fact, in *Wohl v. Spectrum Mfg., Inc.*, 94 F.3d 353 (7th Cir. 1996), an age discrimination case, the Court of Appeals for the Seventh Circuit recently addressed its review of summary judgments in employment discrimination cases. The court of appeals clarified:

> This is not to say that there is a hierarchy of the rigor with which we review cases on summary judgment. There is one summary judgment standard and we apply it rigorously in all cases. It is, however, of particular import in cases that turn on intent and credibility.

Wohl, 94 F.3d at 355, n. 1.

Petitioner's logic is erroneous. It is an effort to craft an argument from isolated examples of the inexactness with which the appellate court sometimes articulates the applicable standard of review. Petitioner's faulty legal research and unsound reasoning present no basis for the petition for a writ of certiorari to be granted.

III.

THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT PROPERLY AFFIRMED SUMMARY JUDGMENT FOR ST. ANTHONY MEDICAL CENTER BECAUSE PETITIONER WAS NEITHER DISABLED NOR PERCEIVED AS SUCH, AND THERE IS NO BASIS FOR THIS COURT TO RE-WEIGH THE EVIDENCE.

Petitioner's argument that the Court of Appeals for the Seventh Circuit misapplied Rule 56(c) of the Federal Rules of Civil Procedure is inconsistent with Rule 10(c) of the Rules of the Supreme Court of the United States, which provides that a petition for a writ of certiorari is rarely granted to review allegedly erroneous factual findings or the claimed misapplication of a properly stated rule of law. Petitioner's contention that her "summary judgment evidence well established at least two triable issues of fact . . . [and that the] . . . evidence was in any objective sense very compelling and even overwhelming" (Pet. 14) provides no credible reason for this Court to review the decision of the court of appeals.

Petitioner chides the appellate court for having the "audacity" (Pet. 15) to state that "it is extremely unlikely, to say the least, that pheresis *was* the indicated treatment for plaintiff's condition." Pet. App. 4 (emphasis in original). Petitioner asserts that by such comment

the court of appeals was "obviously completely disregarding not only the submitted evidence, but also its obligation to view the inferences in a light most favorable to the non-moving party." Pet. 16. Petitioner's argument is frivolous.

As explained above, at the time of summary judgment, the evidence before the district court included a letter from petitioner's doctor which provided that petitioner should try medication, diet and exercise, and only if that failed would she possibly become a candidate for cycles of LDL-pheresis. R. 29. The doctor further explained that petitioner had not followed the recommended course of treatment, so whether pheresis would ever be necessary remained unknown. *Id.* The court of appeals did not ignore such information, and it certainly was not required to go beyond the objective medical facts to save petitioner from summary judgment.

Petitioner asked the district court to deny SAMC's motion for summary judgment based upon the hospital's alleged reaction to her claimed need for a type of medical treatment which no doctor had yet prescribed. When summary judgment was granted, petitioner made the same request of the appellate court. Now that summary judgment has been affirmed and rehearing and suggestion of rehearing en banc have been denied, petitioner asks this Court to consider the same flawed argument under the guise that the facts were ignored or the summary judgment standard was misapplied. Petitioner's lack of necessary proof created a proper basis for summary judgment to be granted and affirmed, and there is no valid reason for this Court to accept the case for further review.

CONCLUSION

For the reasons stated above, respondent, St. Anthony Medical Center, Inc., respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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